Nos. 6550 and 6551

In the United States Circuit Court of Appeals for the Ninth Circuit

J. A. McPHERSON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

J. H. LEIGHTON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITIONS TO REVIEW ORDERS OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

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Assistant Attorney General.
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CITATIONS

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PREVIOUS OPINION

The only previous opinion in these cases is that of the United States Board of Tax Appeals (R. 26–30),[1] which is reported in 22 B. T. A. 390.

[1] Page references are given to the record in the *McPherson case*, No. 6550. The issues presented on the two records are identical.

JURISDICTION

The petitions for review involve income and profits taxes for the year 1919, in the amount of $2,000 in No. 6550 and $900 in No. 6551, and are taken from orders of the United States Board of Tax Appeals entered February 28, 1931. (R. 30–31.) The cases are brought to this Court by petition for review filed June 9, 1931 (R. 48–55), pursuant to the provisions of Sections 1001, 1002, and 1003 of the Revenue Act of 1926 and Section 603 of the Revenue Act of 1928.

QUESTION PRESENTED

Whether a waiver signed in the name of a dissolved corporation by its trustees in dissolution is sufficient to toll the statute of limitations for the assessment of a tax owed by the corporation when it is sought to collect this tax from two of the transferees of the assets of the corporation, both of whom signed the waiver in question.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 22–26.

STATEMENT OF FACTS

The facts found by the Board of Tax Appeals (R. 23–26) may be summarized as follows:

Leighton's, Inc., was organized as a California corporation on March 29, 1919, and operated a cafeteria business in Oakland, California, from that date until the early part of 1920. On June 25, 1920, the corporation was regularly dissolved by

a court decree of dissolution. At the time of dissolution the corporation had outstanding 15,000 shares of capital stock of a par value of one dollar per share. Of this stock the petitioner, J. A. McPherson (No. 6550) held 2,000 shares and J. H. Leighton (No. 6551) held 900 shares.

Prior to the dissolution of the corporation all of its assets were sold to J. H. Leighton for $15,000, and upon dissolution the petitioner, J. A. McPherson, received $2,000, and the petitioner, J. H. Leighton, received $900 in liquidation as stockholders.

Prior to and at the time of its dissolution the Board of Directors of the corporation consisted of J. H. Leighton, J. A. McPherson and Carl Barthel.

On March 15, 1920, the corporation filed a tax return for 1919. This return was signed by J. H. Leighton and Jas. A. McPherson, as officers of the corporation. On March 6, 1925, a waiver was filed extending the time for making any assessment of income or profits taxes due for the year 1919 until December 31, 1925. This waiver was signed in the following manner:

LEIGHTON'S INC.,
A Dissolved Corporation, Taxpayer.
By J. H. LEIGHTON,
JAS. A. MCPHERSON,
CARL BARTHEL,
Surviving Trustees.
D. H. BLAIR,
Commissioner. *WB.*

On September 29, 1925, the Commissioner of Internal Revenue mailed a deficiency notice to the corporation, showing a deficiency in income and profits taxes for 1919 in the amount of $7,986.53. This deficiency was assessed in January, 1926, and has not been paid. On February 21, 1927, the Commissioner mailed notices to the petitioners, advising them of their liability under Section 280 of the Revenue Act of 1926 for the additional tax assessed against the corporation, and proposing an assessment against the petitioner McPherson in the amount of $2,000, and against the petitioner Leighton in the amount of $7,986.53.

The Board of Tax Appeals held that the action of the Commissioner was correct, except that the liability of the petitioner Leighton should be reduced to $900, since that was the amount he had received in liquidation. The petitioners seek review in this Court of this decision of the Board.

SUMMARY OF ARGUMENT

I

The waiver filed March 6, 1925, was valid to extend the period of limitation for assessment of the tax against the corporation. Under Section 400 of the California Civil Code when Leighton's, Inc., was dissolved its three directors became trustees in dissolution with "full powers to settle the affairs of the corporation." This full power clearly in-

cluded the power to adjust an asserted tax liability of the corporation.

This Court has already considered the effect of Section 400 of the California Civil Code, and we believe that its decision in the matter is conclusive of the question now presented. In *United States* v. *Laflin,* 24 F. (2d) 683, this Court in 1928 affirmed a judgment in favor of a corporation which was voluntarily dissolved in 1912.

Even if the corporate powers were not continued for the purpose of settling the affairs of the corporation, the provisions of the California law can not prevent the corporation from exercising a right of waiver under Section 278 (c) of the Revenue Act of 1924. The state law can not be given an effect for tax purposes which conflicts with the affirmative provisions of the revenue laws. This Court has recently so held in *California Iron Yards Co.* v. *Commissioner,* 47 F. (2d) 514.

II

Even if the waivers did not bind the corporation, the petitioners are estopped to deny their validity. With knowledge of the fact that Leighton's, Inc., was a dissolved corporation, the petitioners executed the waiver on its behalf as trustees in dissolution; the Commissioner believed the waiver to be valid and relied upon it. Under these circumstances we submit that the petitioners' act in signing the waiver is binding upon them in re-

spect of their own liability for the corporate taxes as transferees of the corporate assets. It is familiar law that an agent is personally liable in case of a misrepresentation of his authority; and with like reason, the petitioners in signing the waivers upon which the Commissioner relied have estopped themselves from denying their validity in this proceeding. The case of *Lucas* v. *Hunt* (C. C. A. 5th), 45 F. (2d) 781, is directly in point.

ARGUMENT

The petitioners' fourth and sixth assignments of errors in their petitions for review are directed against the constitutionality of Section 280 of the Revenue Act of 1926. But the petitioners do not press this argument in their brief since the Supreme Court has now held that Section 280 is constitutional and that it may be constitutionally applied retroactively. *Phillips* v. *Commissioner,* 283 U. S. 589. Of the assignments of error set forth at pages 3 and 4 of the petitioners' brief, only the first three are supported by argument in the brief. Accordingly, attention is here confined to the questions actually argued by the petitioners.

I

The waiver filed March 6, 1925, was valid to extend the period of limitation for assessment of the tax against the corporation

On June 25, 1920, Leighton's, Inc., the taxpayer, was regularly dissolved by a court decree and no

liquidators were appointed in the decree of dissolution. (R. 23.) At the time of its dissolution its board of directors consisted of J. H. Leighton, J. A. McPherson, and Carl Barthel. (R. 24.) It is clear that under the law of California these individuals became trustees in dissolution with full power to settle the affairs of the corporation. Section 400 of the Civil Code of California (*infra,* pp. 25–26) provides:

> Unless other persons are appointed by the court, the directors or managers of the affairs of a corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and *have full powers to settle the affairs of the corporation,* collect and pay outstanding debts, sell the assets thereof in such manner as the court shall direct, and distribute the proceeds of such sales and all other assets to the stockholders. Such trustees shall have authority to sue for and recover the debts and property of the corporation, and shall be jointly and severally personally liable to its creditors and stockholders or members, to the extent of its property and effects that shall come into their hands. * * * Such trustees may be sued in any court in this state by any person having a claim against such corporation or its property. * * * (Italics ours.)

No limitation as to time is provided by this statute. The provision is simply that the directors become trustees for the creditors and stockholders of

the corporation and have *full powers to settle the affairs of the corporation.* It is plain, we submit, that full power to settle the affairs of the corporation includes the power to adjust an asserted tax liability of the corporation. It was so held in *Jaffee* v. *Commissioner* (C. C. A. 2d), 45 F. (2d) 679, 683, certiorari denied, 283 U. S. 853.

Under the law of California the fact that a corporation is said to be dissolved does not mean that its legal existence is wholly terminated,[2] for Section 400 of the California Civil Code provides for the distribution of its assets and for a remedy so long as there may be creditors. Creditors are entitled to come in to the dissolution proceedings. But this is not their only recourse. As the court said in *In re Balfour & Garrette,* 14 Cal. App. 261, 271:

> And if dissolved by the court's judgment, still having creditors who had not objected to the dissolution in the proceeding for that

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[2] In support of a contrary contention the petitioners rely (Br. 11–14) on certain statements in *Van Landingham* v. *United Tuna Packers*, 189 Cal. 353, *Crossman* v. *Vivienda Water Co.*, 150 Cal. 575, *Sharp* v. *Eagle Lake Lumber Co.*, 60 Cal. App. 386, *Nezik* v. *Cole*, 43 Cal. App. 130, and *Panzer-Hamilton Co.* v. *Bray*, 96 Cal. App. 460. These cases are all plainly distinguishable on their facts. For the most part they hold only that after dissolution action can not be taken by the corporation as a corporation. They do not hold that the trustees in dissolution expressly provided for by Section 400 of the California Civil Code are without power to act. Such a holding would of course be directly contrary to the plain terms of the statute.

> purpose, section 400 of the Civil Code would still afford such creditors a remedy for the protection and judicial assertion of their claims against the corporation.

This Court has already considered the effect of Section 400 of the California Civil Code, and we believe that its decision on the matter is conclusive of the question now presented. In *United States* v. *Laflin,* 24 F. (2d) 683, this Court, in 1928, affirmed a judgment in favor of a corporation which was voluntarily dissolved on February 29, 1912. The action was brought in the name of the corporation by its surviving trustees, who were the directors elected at the last meeting of the stockholders. It was urged that the corporation, by reason of its dissolution, ceased to exist and therefore had no standing to maintain the suit. But this Court disposed of the contention in language which we believe is a complete answer to the petitioners in the case at bar. It said (p. 686) :

> In *Havemeyer* v. *Superior Court,* 84 Cal. 327, it was held that under sections 400 of the Civil Code and 565 of the Code of Civil Procedure the administration of the assets of a dissolved corporation is left, as a rule, to the directors in office at the date of dissolution, whether the dissolution be voluntary or involuntary. Section 400 of the Civil Code provides: "Unless other persons are appointed by the court the directors or managers of the affairs of a corporation at the time of its dissolution are trustees of the

> creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation." No time limit is placed upon the exercise of the power thus vested in the directors, and we find no warrant for holding that it expires before the final settlement of the affairs of the corporation.

Under this decision it is plain that J. H. Leighton, J. A. McPherson, and Carl Barthel, who under the law of California became trustees in dissolution of Leighton's, Inc., had full power to settle the affairs of the corporation, that this power included the authority to sign the waiver in question, and that the power continued so long as the corporation had outstanding liabilities.

In several decisions by Circuit Courts of Appeals waivers signed on behalf of dissolved corporations have been upheld. In *United States* v. *Kemp* (C. C. A. 5th), 12 F. (2d) 7, certiorari denied, 273 U. S. 703, a waiver signed on behalf of a dissolved Texas corporation by its former president and secretary was upheld. The Texas statute with respect to the dissolution of corporations is almost exactly the same as the California provision except that the Texas law expressly continues the existence of the corporation for three years. There is no such time limitation in the California statute. In *Jaffee* v. *Commissioner* (C. C. A. 2d), 45 F. (2d) 679, certiorari denied, 283 U. S. 853, a waiver signed on behalf of a dissolved New York corpora-

tion by its former treasurer was upheld. In its opinion the court said (p. 683) that "clearly the adjustment of taxes was one of the things necessary to the winding up of the corporate business." In *Lucas* v. *Hunt* (C. C. A. 5th), 45 F. (2d) 781, a waiver signed on behalf of a dissolved Texas corporation more than three years after its dissolution was held valid against the person who had signed the waiver. And in *Commissioner* v. *Godfrey* (C. C. A. 2d), 50 F. (2d) 79, certiorari denied, October 26, 1931, a waiver signed on behalf of a dissolved Connecticut corporation by its former president was held valid.

Even if the corporate powers were not continued for the purpose of settling the affairs of the corporation, as provided in Section 400 of the California Civil Code, the provisions of the California law can not prevent the corporation from exercising a right of waiver under Section 278 (c) of the Revenue Act of 1924. The state law can not be given an effect for tax purposes which conflicts with the affirmative provisions of the revenue laws. *United States* v. *Childs,* 266 U. S. 304; *United States* v. *Robbins,* 269 U. S. 315; *Burk-Waggoner Association* v. *Hopkins,* 269 U. S. 110; *Tyler* v. *United States,* 281 U. S. 497. It could not deprive the taxpayer of the benefit of the statute, nor can it prevent the waiver thereof.

This Court considered a similar situation in *California Iron Yards Co.* v. *Commissioner,* 47 F. (2d) 514. There the Secretary of State of California had certified that the taxpayer's corporate powers were suspended from and after March 5, 1921, under the state statute providing that the corporate rights, privileges, and powers of a domestic corporation which had failed to pay the corporation license tax should be suspended and incapable of being exercised for any purpose or in any manner except to defend actions in court. The statute further provided that until such tax, penalties, and charges were paid every person attempting to exercise any of the rights, privileges, or powers of the delinquent corporation should be guilty of a misdemeanor and declared every contract made in violation of the statute void. In holding that a waiver executed for the corporation in 1925 while the suspension was still in effect was valid, this Court said in part (p. 516):

> We do not think that under the state statute rightly construed the contract or waiver in question was void, nor that the acts of the officers, directors, or stockholders in executing the waiver in question were in violation of the penal provisions of the California statute. Moreover, if we concede that the corporation was prohibited by the terms of the state statute from making the waiver in question, such state statute would not control the rights of the corporation or of the government, for the authority to make the

> waiver in question is not derived from the state of California, but is derived from the United States, and, so long as the corporation retains its status as a taxpayer, it is authorized by the federal government to make such waiver, and the inhibition of the state statute against such action is unavailing. As was said by the Court of Claims in *Aldridge, Executrix,* v. *U. S.,* 64 Ct. Cl. 424: "* * * Congress * * * had the power * * * to provide not only a statute of limitations but the right to waive the limitation, and this right was given to the taxpayer. It can not be contended that the power of Congress to confer the right can be taken away by a State statute, much less by the decision of a State court. To say that the right can be granted but the privilege of exercising it can be limited or taken away by a State statute or a decision of a State court would be in effect to destroy the right and thus nullify the act of Congress. The principle here involved was established many years ago in the case of *Gibbons* v. *Ogden,* 9 Wheat. 1, and is too well known to need discussion."

This decision is particularly applicable, in view of the express provisions of the Treasury Regulations to the effect that trustees in dissolution stand in the place of the corporation, even though the powers and functions of the corporation are suspended. By Article 547 of Regulations 45 (1920 ed.) (*infra,* p. 24), it is provided that:

> The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes.

And Article 622 of Regulations 45 (1920 ed.), *infra,* p. 24 provides:

> Notwithstanding that the powers and functions of a corporation are suspended and that the property and business are for the time being in the custody of the receiver, trustee, or assignee, subject to the order of the court, such receiver, trustee, or assignee stands in the place of the corporate officers and is required to perform all the duties and assume all the liabilities which would devolve upon the officers of the corporation were they in control.

These Regulations were in force at the time of the dissolution of Leighton's, Inc., in 1920. Similar provisions have been included in the regulations under all of the Revenue Acts since that time. See Articles 548 and 622, Regulations 62, Revenue Act of 1921; Articles 548 and 622, Regulations 65, Revenue Act of 1924; Articles 548 and 622, Regulations 69, Revenue Act of 1926; Articles 71 and 392, Regulations 74, Revenue Act of 1928. Repeated reenactment of the provisions of the Revenue Acts under which these regulations were issued gives them the force and effect of law. *United States* v. *Hermanos y Compania,* 209 U. S. 337, 339; *National*

Lead Co. v. *United States,* 252 U. S. 140, 146; *Brewster* v. *Gage,* 280 U. S. 327, 337.

Under these regulations the trustees in dissolution retain the power to settle the affairs of the corporation. If there is anything in the California law which is contrary to these regulations, that law can not be effective to limit the right of the United States in the collection of its revenue. *California Iron Yards Co.* v. *Commissioner,* (C. C. A. 9th), 47 F. (2d) 514, *supra.*

It is submitted that the decisions of this Court make it clear that the waiver in this case was valid to extend the period of limitation for assessment against the corporation to a date subsequent to that on which the assessment was actually made. If the assessment against the corporation was valid, it is of course clear that the Commissioner is justified in proposing the assessment against petitioners in this case.

II

Even if the waiver did not bind the corporation, the petitioners are estopped to deny its validity

The record in this case discloses that the Commissioner of Internal Revenue in 1923 proposed to assess additional taxes for the calendar year 1919 against Leighton's, Inc., and that thereafter the trustees in dissolution of the corporation filed an appeal with the Commissioner which was granted in part and denied in part. (R. 6–7.)

While this appeal was pending, the trustees, two of whom are the present petitioners, signed the waiver which is now in question. It thus appears that with knowledge of the fact that Leighton's, Inc., was a dissolved corporation, the petitioners executed the waiver on its behalf as trustees in dissolution, and that the Commissioner believing the waiver to be valid and effective deferred making a valid assessment against the corporation within the statutory period. The petitioners thus impliedly warranted their authority to represent the corporation, and the Commissioner relied upon the petitioners' authority and delayed making the assessment of $7,986.53 until after the expiration of the five-year period.

Under such circumstances, we submit that even if the petitioners' act in signing the waiver was not binding upon the corporation, it is binding upon them in respect of their own liability for the corporate taxes as transferees of the corporate assets under Section 280 of the Revenue Act of 1926. This statutory liability is imposed upon the petitioners under the theory that they, as transferees, received corporate assets in trust for the benefit of all unpaid creditors, including the Government. They as trustees should not be permitted to rely upon their misrepresentations as agents in order that they may derive a personal benefit. It is familiar law that an agent is personally liable in case of a misrepresentation of his

authority. In *Williams* v. *De Soto Oil Co.* (C. C. A. 8th), 213 Fed. 194, the court said (p. 197):

> An agent is undoubtedly personally liable in case of a fraudulent misrepresentation of authority. He is also personally liable if he has no authority and knows it, but nevertheless makes the contract as having such authority, and this for the reason that he induces the other party to enter into the contract by what amounts to a misrepresentation of a fact peculiarly within his own knowledge, and he must be considered as holding himself out as one having authority to contract, and as guaranteeing the consequences arising from any want of such authority. And the courts have also held that, when a party making a contract bona fide believes that such authority is vested in him, but as a matter of fact has no such authority, he is still personally liable upon the contract. In this last case, while it is quite true that the agent is not actuated by any fraudulent motive, nor has he made any statements which he knows to be untrue, yet it is a wrong differing only in degree from a case where he entered into a contract when he had no authority and knew it, for the effect upon a third party with whom he deals is the same.

With like reason, the petitioners in signing the waiver upon which the Commissioner relied have estopped themselves from denying its validity in this proceeding. The principle has been an-

nounced in decisions of the Supreme Court. In *Casey* v. *Galli,* 94 U. S. 673, the Court said (p. 680):

> Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have made appear to exist, and upon which others have been led to rely. Sound ethics require that the apparent, in its effects and consequences, should be as if it were real, and the law properly so regards it.

See also *Morgan* v. *Railroad Co.,* 96 U. S. 716, where the Court said (p. 720):

> The appellee insists that the record discloses a case of estoppel * * *. The principle is an important one in the administration of the law. It not unfrequently gives triumph to right and justice where nothing else could save them from defeat. It proceeds upon the ground that he who has been silent as to his alleged rights when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent. *The Bank of the United States* v. *Lee,* 13 Pet. 107.
>
> He is not permitted to deny a state of things which by his culpable silence or misrepresentations he had led another to believe existed, and who has acted accordingly upon that belief. The doctrine always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against

> whom the doctrine is asserted to take advantage. *Merchants' Bank* v. *State Bank,* 10 Wall. 604.

This was substantially the view of the Circuit Court of Appeals for the Fourth Circuit in the case of *Trustees for Ohio & Big Sandy Coal Co.* v. *Commissioner* 43 F. (2d) 782, where it said (pp. 784–785):

> * * * the taxpayer, by the execution of the waiver, has obtained delay in the assessment of additional taxes and a more deliberate and thorough consideration of the questions involved. Under such circumstances the taxpayer ought not be heard to urge the bar of the statute, which is expressly agreed to waive.

And in *Liberty Baking Co.* v. *Heiner* (C. C. A. 3d), 37 F. (2d) 703, 704, the court said:

> * * * it would be unconscionable to allow the taxpayer to afterwards repudiate a consent upon which the Commissioner has acted and relied. It appears that, in the circumstances, the execution of the waivers was a necessary incident to the securing of further consideration of the plaintiff's tax liability.

There should be stronger reasons for holding that it would be unconscionable for the transferees to repudiate the consent which they themeselves executed in this case than there were in the *Liberty Baking Company* case for holding that the corpora-

tion should not be permitted to repudiate the consent of its officers.

The case of *Lucas* v. *Hunt* (C. C. A. 5th), 45 F. (2d) 781, is directly in point. In that case a Texas corporation was dissolved in 1921 under a statute which provided for the continuance of its corporate existence and the management of its affairs by liquidators for only three years after dissolution. Hunt was one of the liquidators, and more than three years after the dissolution of the corporation, he as president and another as assistant secretary, executed a waiver in the name of the corporation. In the proceeding against Hunt as a transferee, the Circuit Court of Appeals reversed the Board of Tax Appeals, and held that Hunt was estopped to question the validity of the waiver signed by himself. The court said in part (p. 782):

> We are of opinion that Hunt by signing the waiver estopped himself to question its validity, with the result that he was bound to respond to the assessment to the extent of funds in his hands which belonged to the dissolved corporation taxpayer. The circumstances all show that the commissioner relied on the waiver and is therefore entitled to claim the equitable estoppel asserted by counsel in his behalf.

We submit that the petitioners can not repudiate a waiver which they executed with a view to obtaining a reconsideration of the tax liability of the corporation with the possible consequence of re-

ducing or eliminating their liability as transferees. Nor can they avoid their liability as transferees by raising a defense as to the statute of limitations which rests upon their being permitted to show that a consent executed by them for the corporation extending the period of limitations was not effective to accomplish this result.

CONCLUSION

It is respectfully submitted that the decision of the United States Board of Tax Appeals holding that the assessment of the petitioners' liability is not barred by the statute of limitations is correct and should be affirmed.

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DECEMBER, 1931.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27 44 Stat. 9, 61:

Sec. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.

(2) The liability of a fiduciary under section 3467 of the Revised Statutes in respect of the payment of any such tax from the estate of the taxpayer. Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

(2) If the period of limitation for assessment against the taxpayer expired before the enactment of this Act but assessment against the taxpayer was made within such period—then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this Act.

(3) If a court proceeding against the taxpayer for the collection of the tax has been begun within either of the above periods—then within one year after return of execution in such proceeding.

(c) For the purposes of this section, if the taxpayer is deceased, or, in the case of a corporation, has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

(d) The running of the period of limitation upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under subdivision (a) of section 274 to the transferee of fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary and for 60 days thereafter.

(e) This section shall not apply to any suit or other proceeding for the enforcement of the liability of a transferee or fiduciary pending at the time of the enactment of this Act.

(f) As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee.

Treasury Regulations 45 (1920 ed.):

ART. 547. *Gross income of corporation in liquidation.*—When a corporation is dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes. Any sales of property by them are to be treated as if made by the corporation for the purpose of ascertaining the gain or loss. No gain or loss is realized by a corporation from the mere distribution of its assets in kind upon dissolution, however they may have appreciated or depreciated in value since their acquisition. See further articles 622 and 1548.

ART. 622. *Returns by receivers.*—Receivers, trustees in dissolution, trustees in bankruptcy, and assignees, operating the property or business of corporations, must make returns of income for such corporations on form 1120, covering each year or part of a year during which they are in control. Notwithstanding that the powers and functions of a corporation are suspended and that the property and business are for the time being in the custody of the receiver, trustee, or assignee, subject to the order of the court, such receiver, trustee, or assignee stands in the place of the corporate officers and is required to perform all the duties and assume all the liabilities which would devolve upon the officers of the corporation were they in control. A receiver in charge of only part of the property of a corporation, however, as a receiver in mortgage foreclosure proceedings involving merely a small portion

of its property, need not make a return of income. See articles 424 and 547.

Section 400 of the California Civil Code provides as follows:

> 400. Unless other persons are appointed by the court, the directors or managers of the affairs of a corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full powers to settle the affairs of the corporation, collect and pay outstanding debts, sell the assets thereof in such manner as the court shall direct, and distribute the proceeds of such sales and all other assets to the stockholders. Such trustees shall have authority to sue for and recover the debts and property of the corporation, and shall be jointly and severally personally liable to its creditors and stockholders or members, to the extent of its property and effects that shall come into their hands. Death, resignation or failure or inability to act shall constitute a vacancy in the position of trustee, which vacancy shall be filled by appointment by the superior court upon petition of any person or creditor interested in the property of such corporation. Such trustees may be sued in any court in this state by any person having a claim against such corporation or its property. Trustees of corporations heretofore dissolved or whose charters have heretofore been forfeited by law shall have and discharge in the same manner and under the same obligations, all the powers and duties herein prescribed. Vacancies in the office of trustees of such corporations shall be filled as hereinbefore provided; *provided however,* that any deed executed in the name

> of such corporation by the president or vice president and secretary or assistant secretary after a dissolution thereof or after a forfeiture of the charter of such corporation or after the suspension of the corporate rights, privileges, and powers of such corporation, which deed shall have been duly recorded in the proper book of records of the county in which the land or any portion thereof so conveyed is situated, for a period of five years, shall have the same force and effect as if executed and deliveded prior to said dissolution, forfeiture, or suspension.

This section has been in force without change since 1917, except that the proviso at the end of the section was added by an act approved May 23, 1921, California Statutes, 1921, p. 574.

U. S. GOVERNMENT PRINTING OFFICE: 1931